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No. 80-2054

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN BUETTNER-JANUSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search of a laboratory used by petitioner and the seizure from it of drugs and related paraphernalia, which were consented to by petitioner's co-workers, violated petitioner's Fourth Amendment rights.

2. Whether petitioner's Sixth Amendment right to counsel was violated by the admission into evidence of his preindictment statements to government informants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 646 F.2d 759. The October 29, 1980, opinion of the district court (Pet. App. E) is reported at 500 F. Supp. 1285.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1981. The petition for a writ of certiorari was filed on June 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to manufacture and distribute LSD, methaqualone, and other controlled substances, in violation of 21 U.S.C. 846 (Count I), of manufacturing and distributing methaqualone, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2 (Count II), and on two counts of making false statements to government investigators, in violation of 18 U.S.C. 1001 (Counts V and VI.)[1] He was sentenced to three-year terms of imprisonment on the controlled substances counts, which were to be served currently with each other and consecutively to concurrent two-year terms of imprisonment on the false statement counts and which were to be followed by a two-year special parole term on the manufacturing count. The court of appeals affirmed (Pet. App. A).

The facts are set forth in the opinion of the court of appeals (Pet. App. 4-8). Petitioner, a leading authority on physical anthropology, became chairman of the anthropology department of New York University in 1973. To accommodate his research and house the equipment he had brought with him—including a glass-walled "fume hood" designed to prevent the escape of toxic gases—the university remodeled a

[1] At the close of the government's case, the district court directed a verdict of not guilty on Count IV, which charged petitioner with conspiring to obstruct a criminal investigation, in violation of 18 U.S.C. 371. The jury acquitted petitioner on Count III, which charged petitioner with the manufacture and distribution of cylert pemoline, a central nervous system stimulant, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(2).

portion of the fourth floor of a university building into a laboratory. The remainder of the floor contained the pre-existing laboratory of Professor Clifford Jolly, another anthropology professor. Access to Jolly's laboratory could be gained only by using a freight elevator situated in the rear of the building or by going through petitioner's laboratory. At petitioner's invitation, Jolly and the graduate students who assisted him had full access to the use of petitioner's laboratory. Similar access was given to Richard Macris, an undergraduate student whom petitioner hired as a laboratory assistant (Pet. App. 2, 4-5).

In February 1979, Macris began to suspect that some of the chemicals that petitioner had asked him to synthesize were controlled substances. Macris reported his suspicions to Professor Jolly. Thereafter, Macris and Jolly scrutinized petitioner's activities by taking samples of various chemicals, recovering discarded scraps of paper, photographing suspicious containers and keeping a diary of what they observed. After the surreptitiously obtained samples were tested on a confidential basis at a DEA laboratory and found to contain a high concentrate of methaqualone, Macris and Jolly conveyed their findings to the university's president and general counsel. The general counsel, Jolly, Macris and Macris' brother (who had arranged the testing at the DEA laboratory) then went to the United States Attorney's office and presented the evidence to an Assistant United States Attorney. Concluding that the evidence established probable cause, the assistant proposed that a search warrant be obtained but, at the request of the university's counsel, agreed instead to seek permission to search the laboratory from the university's president. After obtaining the president's consent, six

DEA agents, including a supervisory chemist, Jolly, Macris and Macris' brother went to petitioner's laboratory. Jolly used his key to gain entry (Pet. App. 5-6).

Among the items seized by the agents was methaqualone stored in four translucent containers lying in the fume hood. Before he inspected the containers, however, the supervisory chemist, who knew that methaqualone had been detected in the laboratory during Jolly's prior investigation, discovered several jars in the laboratory filled with methaqualone precursors. He also saw an open notebook on a laboratory bench that contained a series of entries that he interpreted as the melting points of methaqualone-containing compounds in various stages of purification and that corresponded to markings on the containers in the fume hood. Examination of the containers—which were sufficiently transparent to allow observation of the nature and appearance of the substances inside—disclosed that they held a white granular solid that resembled an impure form of methaqualone. When the supervisory chemist unscrewed the top of one container he detected the powerful odor of toluene, a solvent regularly used in methaqualone synthesis (Pet. App. 7-9).

ARGUMENT

1. Petitioner contends (Pet. 15-23) that the warrantless search of his laboratory and the subsequent seizure and testing of controlled substances found in it violated his rights under the Fourth Amendment. However, as the court of appeals held in a well-reasoned opinion upon which we rely, there was no such violation here.

a. It is well established that a third party who possesses "common authority over or other sufficient

relationship to the premises or effects sought to be inspected" may authorize a search of those premises or effects. *United States* v. *Matlock*, 415 U.S. 164, 171 (1974). Such common authority rests on "mutual use of the property by persons generally having joint access or control *for most purposes* * * *" (*id.* at 171 n.7; emphasis added). Applying this standard, the court of appeals correctly held (Pet. App. 11-14) that both Macris and Jolly had authority to consent to a search of petitioner's laboratory and the enclosed fume hood. Both had keys giving them access to the laboratory, and petitioner had authorized both to use the laboratory and its facilities. Indeed, Macris' authorization was necessary in order for him to perform his duties as petitioner's hired assistant.

The decision below does not conflict with *United States* v. *Heisman*, 503 F.2d 1284 (8th Cir. 1974). In that case the defendant and a third party were co-tenants in a leased commercial building. Although both men had signed the lease and paid the rent, they were not in business together and they occupied separate areas of the building. In those circumstances the Eighth Circuit held that the third party did not have authority to consent to a search of the area of the building used by the defendant (*id.* at 1288; emphasis in original):

> The question we must decide * * * is whether [the third party] had the requisite "joint access or control for most purposes" over the property. * * * We conclude that he did not. Although there was no door or lock to Heisman's room, it was nevertheless an area set aside for his own private use. [The third party] had only been in the room once and then with Heisman's permission. As a practical matter, [the third party] did not have access or control of Heisman's room for *any* purpose.

Here, by contrast, Macris' and Jolly's laboratory keys and access to and permission to use the very area searched gave them the authority to consent that the third party in *Heisman* lacked.[2]

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[2] Petitioner also contends (Pet. 18-19) that the search cannot be sustained on the basis of Macris' and Jolly's consent because the DEA agents did not rely on that consent, but rather on the authorization to search given by NYU's president, which the district court held to be insufficient (Pet. App. 74-78) and which the court of appeals did not consider. But since Jolly unlocked the door to the laboratory, and since he and Macris participated in the search, their consent was known to the agents, even if the agents placed their primary reliance on the authorization given by the president of the university. The present case thus is distinguishable from *United States* v. *Glasby*, 576 F.2d 734, 737 (7th Cir. 1978), in which the agents who conducted the search were unaware that consent had been given, and *United States* v. *Harris*, 534 F.2d 95, 97 (7th Cir. 1976), in which there was an insufficient basis for the officers reasonably to believe that the third party had authority to consent to the search.

Moreover, the district court's conclusion that the university president did not have authority to consent to the search of the laboratory was incorrect. The laboratory was a university facility, which was under petitioner's control only as an employee of the university. The president of the university, therefore, could inspect the laboratory—or authorize others to do so—if he suspected that petitioner was engaged in work-related criminal activity. See *United States* v. *Bunkers*, 521 F.2d 1217, 1220-1221 (9th Cir.), cert. denied, 423 U.S. 989 (1975); *United States* v. *Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973); *United States* v. *Collins*, 349 F.2d 863, 868 (2d Cir. 1965). Compare *United States* v. *Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951), in which it was held that the defendant's superior had no authority to consent to a search of the defendant's desk for evidence of a crime that was unrelated to the defendant's employment. The cases relied on by the district court (Pet. App. 77), which hold that university officials have no authority to consent to a search for drugs in a student's dormitory room, thus are inapposite.

b. The court of appeals also correctly held (Pet. App. 14-16) that the search of the containers of methaqualone was valid under *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). The containers were in plain view in the fume hood. They bore markings that corresponded to entries in a notebook—open and also in plain view—for the melting points of compounds containing methaqualone. A white granular solid resembling an impure form of methaqualone could be seen inside the containers. In addition, several jars of methaqualone precursors had been discovered in the laboratory, and the drug itself had been detected in the laboratory previously by Jolly. These facts provided the DEA supervisory chemist a sufficient basis at least for opening one of the containers for further inspection, which revealed the odor of toluene and gave him probable cause to believe that the white substance in the containers was methaqualone.

The holding of the court of appeals is not affected by this Court's subsequent decision in *Robbins* v. *California*, No. 80-148 (July 1, 1981). *Robbins* held that law enforcement officers required a warrant to search "a closed, opaque container" found in an automobile (slip op. 8). Unlike the containers at issue in the present case, the packages found in *Robbins* were opaque; nor were there written indicia to support an inference concerning their contents (*id.* at 1-2 & n.1). Accordingly, nothing in *Robbins* prohibits the actions taken by the agents in this case.

c. Relying upon *Walter* v. *United States*, 447 U.S. 649 (1980), petitioner contends (Pet. 21-23) that a warrant was required before either the samples surreptitiously obtained by Jolly or the contents of the containers seized by the DEA supervisory chemist could be subjected to chemical analysis. At the outset we note that if petitioner's novel claim had merit,

virtually all drug cases that have heretofore been prosecuted would have entailed Fourth Amendment violations, since once law enforcement officers are legally in possession of drugs they routinely subject them to chemical analyses before trial without obtaining a warrant or consent for such procedures.

In any event, the flaw in petitioner's contention is that once law enforcement officers are legally in possession of a druglike substance, its owner has no significant residual privacy interest in avoiding chemical analysis of the substance comparable to the residual privacy interest, recognized in *Walter*, that an individual has in not having films that already are lawfully in the possession of law enforcement officers viewed by those officers. The crucial distinction is that whereas the viewing of even legitimate films could subject their owner to acute embarrassment, there are no conceivable consequences of subjecting a druglike substance that is already in the possession of law enforcement officers to chemical analysis that require protection beyond the existence of probable cause for the seizure. See *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), in which the plurality held that once law enforcement officers had legally seized the defendant's car, they required neither a warrant nor consent to remove paint samples from that car in order to compare them with paint that had been found on the car of the victim.

Moreover, not only did the inspection of the film in *Walter* arguably implicate First Amendment concerns (447 U.S. at 655), but the defendants in that case, by enclosing their film in wrapped and sealed containers, "with no labels or markings to indicate the character of their contents" (*id.* at 658; footnote omitted), had taken pains to preserve its privacy. No such First Amendment implications arise from

petitioner's illicit drug experimentations, and petitioner took no comparable steps to preserve the privacy of the methaqualone he had manufactured. The substance was left in plain view in a laboratory to which petitioner had given Jolly, Macris and others full access. Indeed, rather than disguising the substance kept in the seized containers, petitioner had disclosed its nature by visible markings on the containers and corresponding notations in an open notebook lying nearby. In such circumstances, *Walter* does not require a warrant before the contents of translucent containers are examined or analyzed to determine whether they are contraband (447 U.S. at 658-659 n.12).[3]

In addition, by engaging Macris in the production of the illegal drugs, petitioner took the risk that Macris would himself analyze the drugs, or that he would consent to the testing of the drugs as well as to the search of the laboratory. Macris did consent to government testing, first by furnishing to the DEA the samples that he and Jolly had surreptitiously obtained from the laboratory, and subsequently by accompanying the DEA agents to the laboratory, assisting them in their search of it, and permitting them to leave with the seized drugs.

3. Finally, petitioner contends (Pet. 23-26) that his Sixth Amendment right to counsel and his Fifth Amendment due process right "to hire his own lawyer

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[3] This Court granted the State's petition for a writ of certiorari and vacated the judgment in *California* v. *Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980), on which petitioner relies (Pet. 23 & n.*), and remanded the case to the Court of Appeal of California, Fifth Appellate District, for further consideration in light of *New York* v. *Belton*, No. 80-328 (July 1, 1981). *California* v. *Riegler*, No. 80-1421 (July 2, 1981).

to assist him during the investigative stages of this case" (Pet. 24) were violated when Macris and others, acting at the direction of the government, tape recorded conversations with petitioner after a grand jury investigation had begun and petitioner had retained counsel. As the district court stated (Pet. App. 50-51), however, "[b]ecause the tape recordings were made in this case before the initiation of any adversary criminal proceedings, the presence or waiver of counsel during those recordings was not required by the Sixth Amendment." See *Moore* v. *Illinois*, 434 U.S. 220, 226-227 (1977); *Brewer* v. *Williams*, 430 U.S. 387, 398, 401 (1977); *Kirby* v. *Illinois*, 406 U.S. 682, 689-690 (1972). Accordingly, the present case is readily distinguishable from *United States* v. *Henry*, 447 U.S. 264 (1980), in which the statements at issue were made by the defendant after he had been indicted and counsel had been appointed for him and while he was in custody, and *Massiah* v. *United States*, 377 U.S. 201 (1964), in which the defendant's statements were made after he had been indicted and had retained counsel.[4]

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[4] Petitioner's additional reliance (Pet. 25) on Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility and the cases construing it is misplaced. As the Court noted in *United States* v. *Henry*, *supra*, 447 U.S. at 275 n.14, that rule "does not bear on the constitutional question * * *." Moreover, as the district court pointed out, the cases relied on by petitioner (Pet. 25 n.**) "involved actual custodial interrogation by prosecution attorneys after an arrest" (Pet. App. 55). *United States* v. *Thomas*, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973), involved a statement taken from a defendant while he was incarcerated following the filing of a criminal complaint against him, appointment of counsel and his appearance with counsel at a preliminary hearing.

Nor did the government's taping of petitioner's conversations violate his rights under the Fifth Amendment. As the Court stated in *United States* v. *Henry, supra,* 447 U.S. at 272, citing *Hoffa* v. *United States,* 385 U.S. 293, 302 (1966), "[i]t is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Although the Tenth Circuit found the procedure violative of the canons of ethics, it concluded (474 F.2d at 112) that such a violation "need not be remedied by a reversal of the case wherein it is violated."

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